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Supreme Court, U.S.
FILED
MAR 26 2004
OFFICE OF THE CLERK

No. 03-1347

IN THE
Supreme Court of the United States

JACQUELINE ORLOFF,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's statement of the Questions Presented relies on a misstatement of the breadth of the decision below. Properly framed, the question presented is:

> Whether the Federal Communications Commission abused its discretion in determining that it was not unreasonable under 47 U.S.C. § 201(b) or unreasonably discriminatory under 47 U.S.C. § 202(a) for a wireless communications service provider, doing business in a competitive market, to offer customer-specific incentives to retain and attract customers.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties do not appear in the caption of the case on the cover page. In addition to the Petitioner, Jacqueline Orloff, and the Respondents, the Federal Communications Commission and the United States of America, New Par and Verizon Wireless (VAW) LLC were parties to the proceeding below and are parties to this proceeding entitled to file documents in this Court under Rule 12.6.

New Par is licensed to offer Commercial Mobile Radio Services ("CMRS") in the States of Michigan and Ohio and provides wireless telecommunications services to the public under the trade name "Verizon Wireless." New Par is indirectly owned 100% by Cellco Partnership d/b/a Verizon Wireless ("Cellco"). Except as described below, neither New Par nor any parent company has debt or equity in the hands of the public.

Verizon Wireless (VAW) LLC, formerly known as Vodafone AirTouch Licenses LLC, is a general partner of New Par and is a holding company directly owned 100% by Cellco. Except as described below, neither Verizon Wireless (VAW) LLC nor any parent company has debt or equity in the hands of the public.

Cellco is a general partnership that provides wireless telecommunications services to the public. Cellco is ultimately owned by Verizon Communications Inc. ("Verizon") and Vodafone Group Plc ("Vodafone"). Verizon, a publicly traded corporation with equity and debt in the hands of the public, provides communications services to the public. Vodafone, a publicly traded English corporation with debt and equity in the hands of the public, provides telecommunications services throughout the world. Neither Verizon nor Vodafone has a

parent company, and no publicly held company has a 10% or greater ownership in either.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents New Par and Verizon Wireless (VAW) LLC (collectively, "Verizon Wireless"), pursuant to Rule 12.6, respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Jacqueline Orloff. The decision below correctly affirms an order by the Federal Communications Commission ("Commission" or "FCC") applying the plain language of sections 201(b) and 202(a) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 201(b), 202(a).

The petition should be denied because the decision below does not conflict with any decisions of the courts of appeals or of this Court. Petitioner erroneously asserts that a conflict exists by referring to cases that establish a standard for determining *whether* a person is a common carrier. Those cases, however, do not address the distinct issue posed in this case: what *duties* are imposed by the Act on persons deemed to be communications common carriers who are prohibited from filing tariffs and operate in a competitive market. Because the decision below does not conflict with any case with regard to the scope of a common carrier's duties in this factual context, and because the decision does not otherwise warrant review, the petition should be denied.

STATEMENT OF THE CASE

From February 1999 to February 2001, Verizon Wireless provided wireless communications services to Petitioner, a consumer located in the Cleveland, Ohio area. Pet. App. 2a. During this period, consumers in Cleveland could acquire wireless communications services from five, non-dominant facilities-based providers and numerous resellers, each of which of-

fered a choice of packages and a range of services and features. *Id.* at 2a-3a, 12a-13a. As a result of this head-to-head competition, consumers were enjoying declining access and airtime rates, decreasing roaming and long distance charges and increasingly attractive service offerings. *See id.* at 12a-13a. Consumers also were benefiting from pricing plans that included significant bundled minutes and less restrictive terms and conditions. *Id.* Promotions gave consumers access to equipment discounts and opportunities to try features for a limited time at no charge to see if they added value to the provider's airtime offerings. *Id.*

During this period, Verizon Wireless sometimes gave individual customers some inducement not included in any standard rate plan or promotion so that the particular customer would either keep its business with Verizon Wireless or take service from the company. *Id.* at 2a-3a, 13a-14a. These inducements were referred to as "retention concessions" and "sales concessions" respectively. *Id.* at 13a-14a. They entailed, for example, a one time or monthly recurring credit on the customer's bill, some number of minutes added to the minutes already bundled in the customer's rate plan, an equipment discount or rebate, and/or some service feature (*e.g.*, voice mail, call forwarding, weekend calling) at no charge for some period of time. *Id.*

Contrary to Petitioner's claim that she "did not get a discount" from Verizon Wireless, Pet. 8, Petitioner in fact secured concessions from Verizon Wireless on two separate occasions. Pet. App. 3a. In February 1999, Petitioner agreed to a two-year mobile phone contract with Verizon Wireless. *Id.* She purchased an advertised plan and received several sales concessions. *Id.* Five months later, Verizon Wireless agreed to let Petitioner switch to a different rate plan and gave Petitioner a billing credit as a retention concession. *Id.* Nevertheless, in February 2000, Petitioner commenced a putative class action in the

United States District Court for the Northern District of Ohio, alleging that Verizon Wireless's practice of granting sales and retention concessions was unjust and unreasonable and unreasonably discriminatory in violation of sections 201(b) and 202(a) of the Act, 47 U.S.C. §§ 201(b), 202(a). Pet. App. 3a. The district court referred the case to the FCC and stayed further proceedings. *Id.*

Petitioner filed a complaint with the FCC under section 208 of the Act, 47 U.S.C. § 208. The FCC ultimately denied the complaint on the merits, ruling that Verizon Wireless's practice of providing sales and retention concessions did not violate sections 201(b) or 202(a) of the Act. Pet. App. 4a. The FCC concluded that, given the high degree of competition in Cleveland, it was reasonable for Verizon Wireless to offer added, customer-specific incentives to attract or maintain individual customers. *Id.* at 17a-21a. In support, the FCC noted that the company's practice did not unreasonably discriminate against any customer or any group of customers because all customers were equally likely to be offered or not offered a concession. *Id.* at 18a. Indeed, the FCC found that it was "uncontroverted" that Verizon Wireless "was willing to engage in negotiations initiated by any customer." *Id.* at 20a. In short, the FCC held that Verizon Wireless's concessions practice was a reasonable response to competitive conditions in the Cleveland market, and was not unjust or unreasonable discrimination in violation of the Act. *See id.* at 2a.

On appeal to the D.C. Circuit, Petitioner challenged the FCC's findings as to Verizon Wireless's sales concessions, but declined to pursue the agency's findings with regard to retention concessions. *See id.* at 3a. The D.C. Circuit affirmed the FCC's judgment, concluding that "the Commission properly determined that Verizon [Wireless's] concessions practice benefited consumers and was therefore reasonable" under sections 201(b) and 202(a). *See* Pet. App. 10a.

REASONS FOR NOT GRANTING THE WRIT

I. The Decision Below Does Not Conflict with the Decisions of Any Other Court

Petitioner mistakenly alleges that the decision below conflicts with this Court's opinion in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), and with the opinions of other circuits and other courts. *See* Pet. 9-11. Those precedents discuss the standard for determining whether a person is acting as a common carrier. That fact is not disputed in this case; Verizon Wireless is a common carrier under 47 U.S.C. § 332(c)(1)(A).

Midwest Video involved a challenge to FCC rules requiring cable television operators to set aside dedicated channels for public access (*i.e.*, channels on which programming is selected by the public). The Court held that these rules were invalid because they regulated cable companies as common carriers in violation of 47 U.S.C. § 153(h) ("a person engaged in . . . broadcasting shall not . . . be deemed a common carrier"). This Court reasoned that the requirement that cable operators make channels available to broadcasters on an indiscriminate basis treated them as common carriers. *Midwest Video*, 440 U.S. at 701-02. The Court quoted the definition of a common carrier announced in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"), discussed below, to support its conclusion that the FCC's rules improperly treated cable operators as common carriers by requiring them to hold themselves out indifferently to broadcasters. The Court, however, did not address the specific substantive duties imposed by the Act on persons deemed to be common carriers. *Midwest Video*, therefore, does not support Petitioner's contention that the common law definition of common carrier imposes substantive obligations or defines the scope of such obligations under §§ 201(b) and 202(a).

NARUC I likewise does not support Petitioner's argument. That case involved an FCC order holding that the newly-created Specialized Mobile Radio Systems ("SMRS") radio service should be classified as a private, rather than a common carrier, service. *NARUC I*, 525 F.2d at 647. In its analysis, the D.C. Circuit considered the common law definition of common carrier, observing that:

> a carrier will not be a common carrier where its practice is to *make individualized decisions, in particular cases, whether and on what terms to deal.* It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.

Id. at 641 (emphasis added).

NARUC I, however, does not impose substantive duties upon communications common carriers. The court described the characteristic of "holding out" to serve the public "indifferently" and "indiscriminately" as a "*prerequisite* to common carrier status," and not as a substantive bar to dealing with customers individually. *Id.* at 642 (emphasis added). The court instead recognized that a communications common carrier's *substantive* duties derive from the Act:

> If practice and experience show the SMRS to be common carriers, then the Commission must determine its responsibilities from the language of the Title II common carrier provisions.

Id. at 644. The court did not elaborate upon those statutory duties in *NARUC I.*

Petitioner's footnote string cite of additional cases, provided without any analysis, is inadequate on its face to demon-

strate a conflict with other federal courts. Pet. 11 n.1. Moreover, while most of these cases contain language similar to the *NARUC I* language, the cases do not discuss a common carrier's obligations under §§ 201(b) or 202(a).

In sum, the D.C. Circuit's opinion at issue here is entirely consistent with these cases. As the court stated:

> The traditional, common law definition of a communications common carrier . . . was employed "to draw a coherent line between common and private carriers," . . . which is how the Supreme Court used the definition in *Midwest Video*. When the common carrier designation fit, the regulatory consequences depended upon the requirements set forth in Title II.

Pet. App. 6a-7a (citations omitted).

II. The Decision Below Is Correct

Lacking any credible claim that certiorari is warranted due to a conflict with Supreme Court precedent or a circuit conflict, Petitioner asserts that the opinion below reflects an erroneous interpretation of section 202(a) of the Act. Pet. 11-15. Petitioner argues that the D.C. Circuit improperly considered "whether the non-discrimination rule should apply at all, not whether there was a reason for selecting [Petitioner] and not others." *Id.* at 14. Petitioner also states that the court incorrectly "limited its analysis to discrimination between groups despite the plain language of 202." *Id.* at 15. Petitioner's arguments, even if accurate, do not warrant review. *See* Rule 10; *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). In any event, Petitioner is again mistaken.

Petitioner incorrectly asserts that the court below held that the discrimination rule was wholly inapplicable. Pet. at 14. Instead, the court determined that the FCC properly applied the nondiscrimination rule to this situation – a fact-bound question that does not warrant this Court's review. The FCC concluded that there was no unreasonable discrimination among individuals because it was "uncontroverted" that Verizon Wireless was "willing to engage in negotiations initiated by any customer." *Id.* at 20a. The D.C. Circuit's opinion reflects the agency's reasoning, stating that "although, in terms of charges and services, Verizon [Wireless] treated [Petitioner] differently than some other similarly situated customers, Verizon [Wireless] did not engage in unjust or unreasonable discrimination." *Id.* at 4a.

The FCC's conclusion, affirmed by the D.C. Circuit, that Verizon Wireless did not violate 47 U.S.C. § 202(a) was based on the particular characteristics of the wireless industry as it operated in this geographic market. One critical fact is that wireless carriers are not permitted to file tariffs under 47 U.S.C. § 203. *See* Pet. App. 7a-8a; *see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 1411 (1994). "Because the current system bears so little resemblance to the paradigm that existed prior to the time the Commission, with the blessing of Congress, began deregulating CMRS, we agree with the Commission that the legality of Verizon [Wireless's] sales concessions practice depends not on the company's designation as a common carrier, but on § 202." Pet. App. 8a.

In the absence of a tariff, the FCC had to determine on a case-by-case basis whether the challenged practices are "reasonable" under 47 U.S.C. § 202(a). The agency concluded that Verizon Wireless's concessions practice met that standard because of the competitiveness of the Cleveland market. The D.C. Circuit affirmed this finding as consistent with the broad reasonableness standard of § 202(a), which "'opens a rather

large area for the free play of agency discretion, limited of course by the familiar 'arbitrary' and 'capricious' standard in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).'" Pet. App. 8a (quoting *Bell Atlantic Telephone Company v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996)). The court agreed that the FCC "'was entitled to value the free market, the benefits of which rather are well established'" when it made that reasonableness determination. Pet. App. 9a (quoting *MCI WorldCom v. FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000)).

Based on these considerations, the court upheld the FCC, stating that "[h]aggling is a normal feature of many competitive markets. It allows consumers to get the full benefit of competition by playing competitors against each other." Pet. App. 10a. The court found further that Verizon Wireless adopted "the practice as a competitive marketing strategy" and "[c]onsumers, including [Petitioner], can only benefit." *Id.* The court also recognized that accepting Petitioner's arguments would harm consumers by forcing Verizon Wireless either to abandon the use of concessions or to adopt an impractical and unduly burdensome tracking system. *Id.* The D.C. Circuit, therefore, correctly affirmed the FCC's determination that "Verizon [Wireless's] concessions practice was an appropriate response to competitive pressures in the Cleveland market which benefited consumers and was therefore reasonable under § 202" of the Act. Pet. App. 10a.

In sum, the D.C. Circuit's decision upholds the FCC's straightforward application of the plain language of §§ 201(b) and 202(a) which "is confined to the facts of this case, which involve a highly-competitive . . . market [Cleveland, Ohio] occupied by a number of non-dominant carriers." Pet. App. 35a. Thus, contrary to Petitioner's claims, the decision will not rework the law applicable to other regulated industries. *See* Pet. 15-16.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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May 26, 2004